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Nos. 87-1622, 87-1697, and 87-[illegible]

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION, et al.,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, et al.,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,
Respondent.

ON WRITS OF CERTIORARI TO THE
COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF QPOA AND S/SPAWN FOR LEAVE TO FILE AMICUS CURIAE BRIEF
(followed by proposed brief)

Thomas M. Christ*
Dennis D. Reynolds
MITCHELL, LANG & SMITH
2000 One Main Pl., 101 S. W. Main
Portland, OR 97204
Telephone: (503) 221-1011
Attorneys for QPOA and S/SPAWN

*Counsel of record

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Quinault Property Owners Association, Inc. (QPOA), a Washington corporation, and Salmon/Steelhead Protection and Wildlife Network, Inc. (S/SPAWN), also a Washington corporation, respectfully move the Court for leave to file the attached amicus brief in support of petitioner Wilkinson.

GROUNDS FOR MOTION

Wilkinson, a non-Indian, owns land in fee simple within the boundaries of the Yakima Indian Reservation in southern Washington. The tribe has enacted a zoning ordinance that purports to apply to all lands on the reservation, including Wilkinson's. At issue in these proceedings is whether the tribe is empowered to regulate the use of reservation land owned by non-Indians.

Movants are associations of persons similarly situated to Wilkinson, and so are interested in the outcome of these

proceedings.

QPOA is an association of approximately 300 persons, mostly non-Indians, who own land in fee simple within the limits of the Quinault Indian Reservation in northwest Washington. The Quinault Tribe, like the Yakima Nation, has adopted a zoning ordinance that purports to apply to all land within the reservation boundaries, including land owned by non-tribal members, many of whom belong to QPOA.

S/SPAWN is an association of approximately 10,000 persons and organizations interested in the proper management and regulation of Washington's natural resources, including timber, fish, and wildlife. Some of S/SPAWN's members own land in fee within the boundaries of the Yakima and Quinault reservations. As noted above, those tribes have enacted comprehensive zoning ordinances that, among other things, purport to regulate and

manage natural resources on reservation lands, whether held in fee or trust. For example, the ordinances restrict or prohibit fishing, hunting and woodcutting on certain tracts of land.

QPOA and S/SPAWN did not decide to submit an amicus brief until there was too little time to obtain written consent of the parties pursuant to Supreme Court Rule 36.2, which is why they seek leave by motion to file such brief. See Rule 36.3.

QPOA and S/SPAWN believe the arguments contained in their brief will aid the Court in deciding this case and, therefore, urge this motion be granted.

Respectfully submitted,

Thomas M. Christ

Dennis D. Reynolds
Mitchell, Lang & Smith
2000 One Main Place
101 S.W. Main
Portland, OR 97204
(503)221-1011

Nos. 87-1622, 87-1697, and 87-1711

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BRIEF OF AMICI QPOA AND S/SPAWN

Thomas M. Christ
Dennis D. Reynolds
MITCHELL, LANG & SMITH
2000 One Main Pl., 101 S. W. Main
Portland, OR 97204
Telephone: (503) 221-1011
Attorneys for QPOA and S/SPAWN

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INTEREST OF AMICI

The interest of Quinault Property Owners Association, Inc. (QPOA) and Salmon/ Steelhead Protection and Wildlife Network, Inc. (S/SPAWN) is explained in the attached motion for leave to file this brief.

SUMMARY OF ARGUMENT

As a general rule, an Indian tribe cannot regulate the activities of a non-Indian on non-Indian land within the reservation, unless the activities concern a "consensual relationship" between the non-Indian and the tribe or threaten the "political integrity, economic security, or health or welfare of the tribe." Montana v. United States, 450 U.S. 544 (1981). In this case, the Court of Appeals turned the exception into the rule. It held that the Yakima Nation could regulate a non-Indian's use of non-Indian land within the Yakima reservation, despite findings by the

District Court, left unaltered by the Court of Appeals, that the non-Indian is not in a consensual relationship with the tribe and that his proposed development does not threaten tribal welfare.

ARGUMENT

There are two sources of tribal authority over non-Indians -- acts of Congress and "inherent tribal sovereignty." F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 253 (1982 ed.). These sources are discussed in turn below.

I

Congress delegates powers to tribes through treaties and statutes. The Treaty with the Yakimas, 12 Stat. 951, signed in 1855 and ratified in 1859, relinquished the tribe's claim to lands occupied by them in southeastern Washington, excepting a tract reserved for its "use and occupation." The treaty provides in Article II that the

reservation "shall be set apart * * * for the exclusive use and benefit of" the Yakimas, and that no "white man, excepting those in the employment of the Indian Department be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent." Arguably, these provisions grant the Yakimas the authority to regulate activities on all land within the reservation's boundaries. However, in Montana v. United States, 450 U.S. 544 (1981), the Court held that similar language in the treaty establishing the Crow Reservation in Montana, see Second Treaty of Fort Laramie, 15 Stat. 649, did not grant the Crow Tribe power to regulate activities -- specifically, hunting and fishing -- by non-Indians on non-Indian land within that reservation. The Court said that treaty rights with respect to reservation lands must be read in light of

the subsequent alienation of those lands under the Allotment Acts:

> "The treaty [establishing the Crow reservation], therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe the authority to control fishing and hunting on those lands. But that authority could only extend to land on which the tribe exercises 'absolute and undisturbed use and occupation.' And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. [section] 331 et seq., and the Crow Allotment Act of 1920, 41 Stat. 751. If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians."

450 U.S. at 558-59 (footnotes omitted).

In a footnote to its opinion, the Court explained that tribal regulation of non-

Indians on fee land was inconsistent with the purpose of the Allotment Acts:

> "There is simply no suggestion in the legislative history [to the Allotment Acts] that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. * * * It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. * * *"

Id. at 559, n. 9.

The Treaty with the Yakimas, like the Fort Laramie Treaty, contained assurances against non-Indian settlement on the reservation. But federal policy toward Indians changed after the treaty was signed. The Allotment Acts of the late nineteenth and early twentieth centuries,

especially the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. 331 et seq., commonly referred to as the Dawes Act, allowed large portions of the reservation to pass into non-Indian ownership. The Treaty with the Yakimas does not grant the tribe power to regulate use of those lands, just as the 1868 Fort Laramie Treaty does not grant the Crow Tribe power to regulate use of alienated land within its reservation, according to Montana v. United States, supra.

II

Statutes are the second form of congressionally delegated authority to tribes. Congress has, on occasion, passed statutes granting tribes power to regulate activities by non-Indians within reservation limits. See, e.g., 18 U.S.C. sec. 1161 (authorizing tribes to regulate sale and consumption of alcohol on reservations, including sale or

consumption by non-Indians). However, no statute authorizes tribes generally, or the Yakimas in particular, to zone land held in fee by non-Indians -- at least, the Yakimas rely on no particular statute.

III

The second source of tribal power is "inherent tribal sovereignty." The Court has long recognized that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1975). However, incorporation into the United States implicitly divested tribes of many inherent powers, including the power to regulate all persons on tribal land, Indian or non-Indian. Montana v. United States, supra, 450 U.S. at 563. In United States v. Wheeler, 435 U.S. 313, 326 (1978), the Court identified the inherent powers divested and retained:

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe * * *.

"These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status."

Later cases followed the rule that inherent tribal sovereignty does not apply to non-Indians. In Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), the Court held that tribe has no jurisdiction over crimes committed by non-members within its reservation. And in Montana v. United States, supra, the Court held the Crow

Tribe could not prohibit hunting and fishing by non-members on reservation lands no longer owned by the tribe. The Montana Court said the principle underlying Oliphant -- that tribes possess limited power over non-members -- applied in the civil as well as criminal context. "Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe." 450 U.S. at 565 (footnote omitted). This proposition is not new. In Fletcher v. Peck, 6 Cranch 87, 147 (1810) -- the first Indian case to reach the Court -- Justice Johnson wrote that Indian tribes have lost any "right of governing every person within their limits except themselves."

IV

The Montana Court recognized two exceptions to the general rule that tribes cannot regulate the activities of non-Indians on non-Indian land within reservations. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Second, "[a] tribe may * * * exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566. The Court found, however, that neither exception fit the case before it, because non-Indian hunters and anglers on non-Indian land did

not enter consensual relationships with the tribe, and because non-Indian hunting and fishing did not threaten the tribe's political and economic security, nor its health or welfare. In addition, the Court found to be relevant evidence that the State of Montana had for many years regulated non-Indian hunting and fishing on reservation lands, and that the tribe had "traditionally accommodated" itself to that regulation, Id. at 566, suggesting that tribal regulation of non-Indians is precluded by the existence of effective regulation by another sovereign.

V

As noted above, there are two exceptions to the general rule that inherent tribal powers do not extend to activities of non-Indians on non-Indian land: tribes may regulate activities of non-Indians who enter consensual relationships with the tribe, as well as activities of

non-Indians that threaten tribal political and economic security. Neither exception justifies the Yakima Nation in regulating Wilkinson's use of his land.

The first exception does not apply because there is no evidence of an agreement or dealings between Wilkinson and the tribe -- such as a lease or contract -- so as to subject him to the tribe's civil jurisdiction. 617 F. Supp., at 757.

The second exception does not apply because Wilkinson's proposed development does not threaten the tribe's political or economic security, nor its health or welfare. The District Court made the following findings of fact, which, under Rule 52(a) of the Federal Rules of Civil Procedure, must be accepted as true unless clearly erroneous:

> "10. The trust land in the vicinity of the Wilkinson property is not a significant source of food for members of the Yakima Nation. The

> proposed Wilkinson development does not threaten a food source of members of the Yakima Nation.
>
> "11. Similarly, the Wilkinson project does not threaten the economic security of the Yakima Nation. The [Nation] has not demonstrated how Yakima County's regulation of the land use of Wilkinson's 'Open Area' property in any way places its economic security in jeopardy.
>
> "12. In contrast to the 'Closed Area,' the 'Open Area' is not of unique religious or spiritual significance to the members of the Yakima Nation. The County's regulation of the Wilkinson property will not significantly infringe on those cultural values.
>
> "13. While the court is aware of the special role which land and other natural resources play in the culture of the Yakima Indian Nation, the court finds that the County's exercise of its land use regulatory jurisdiction over the subject property does not threaten those aspects of the tribal culture.
>
> "14. The Yakima Nation's political integrity will not be diminished. The County's regulation of Wilkinson's fee land will not hinder the

> Yakima Nation from exercising its regulatory jurisdiction over the trust land.
>
> "15. In sum, the court finds that Yakima County's exercise of its regulatory jurisdiction over the at-issue Wilkinson property does not threaten and will not have a direct effect on the Yakima Nation's political integrity, its economic security or its health or welfare."

617 F. Supp., at 755.

These findings, left undisturbed by the Court of Appeals, establish that Wilkinson's proposed development does not in any way threaten tribal political and economic security. That being so, the second exception to the rule limiting tribal control of non-members does not apply. Nevertheless, the Court of Appeals held that the second exception does apply. That was error.

The Court of Appeals supported its decision by noting that "[t]he Yakima Nation has alleged a number of

justifications for regulating the open area and in particular the Wilkinson property." 828 F.2d, at 535-36. What matters, however, is what the Yakima Nation proved, not what it alleged. According to the District Court, whose findings are not challenged, the tribe did not prove a threat to its political or economic security, nor to its health or welfare. Therefore, the tribe is without power to regulate Wilkinson's use of his land, under the rule discussed in Montana.

Assuming it proved a threat to tribal interests, the Yakima Nation did not also prove that regulation by Yakima County fails to alleviate the threat. As noted above, Montana suggests that effective state regulation of non-Indian activities on reservation land is a factor to consider in determining tribal authority to regulate the same activities. 450 U.S., at 566. In this case, the State of

Washington, through its subdivision, the county, regulates land use within the open area of the Yakima reservation, wherein Wilkinson's property lies. Not only does the state regulate such land, it does so effectively, or so the District Court found. Specifically, the District Court found that the county's zoning scheme is "more protective" of agricultural lands in the open area than is the tribe's scheme. 617 F. Supp., at 755. In view of this finding, which the Court of Appeals did not disturb, the real threat to tribal welfare may be replacing county zoning with tribal zoning.

VI

The Court of Appeals broadly construed the exceptions to the rule that Indian tribes cannot regulate non-member activities on fee land within reservations. There are, however, sound reasons to construe the exceptions narrowly.

First, there is no political check on tribal decisions affecting non-Indians. Typically, non-Indians have no right to participate in tribal government. They cannot vote in tribal elections, hold tribal office, or otherwise partake in tribal politics. They are, in essence, disenfranchised. The exclusion of non-Indians from tribal government delegitimizes tribal regulation of non-Indians. This nation is founded on the principle that "each sovereign governs only with the consent of the governed." Nevada v. Hall, 440 U.S. 410, 426 (1979).

Second, there is no judicial check. One attribute of sovereignty retained by tribes is immunity from suit. A tribe generally cannot be sued by non-members, at least not without the tribe's consent, see F. Cohen, supra, at 324-26, which is often withheld.

Third, there is no constitutional check. The provisions of the Constitution that

protect individual liberty and property from governmental intrusion, most notably the Bill of Rights, are, for the most part, limitations on Congress and the states. Indian tribes are not bound by these limitations, except where imposed by statute. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Talton v. Mayes, 163 U.S. 376 (1896).

In the absence of political, judicial, or constitutional checks, tribal regulation of non-members may become oppressive. Tribal zoning is particularly susceptible to abuse. It can be used as an inexpensive form of condemnation by tribes interested in reacquiring reservation land lost to non-Indians through allotment or sale. Through zoning, a tribe can limit the use of such land to the point that it becomes virtually worthless and unsalable except to the tribe at a greatly reduced price.

The case of George Garland, president of amicus Quinault Property Owners Association, illustrates the point just made. Mr. Garland, a non-Indian, owns a tract of land on the Quinault Indian Reservation in northwestern Washington. The Quinaults have enacted a comprehensive zoning ordinance, under which Mr. Garland's land is designated "wilderness." Land so designated generally cannot be improved or developed. The only uses permitted unconditionally are picnicking, hiking and "day camping." A conditional use permit is required for overnight camping and timber harvesting. Most other commercial, industrial and residential activities are prohibited. See Quinault Zoning Ordinance sec. 48.04.06. Following its designation as wilderness, the value of Mr. Garland's property, as assessed by Grays Harbor County, wherein the reservation lies, dropped from $32,000 to

$2700. These amici do not mean to suggest that the Quinault tribe is in fact zoning Mr. Garland's land in order eventually to acquire it on the cheap -- merely that he would have no recourse if it is, which demonstrates the need for courts to be cautious in permitting tribal regulation of nonmembers.

The desire for recovery of treaty lands is strong-felt and pervasive among Indian tribes. Indeed, in its oral findings in this case, the District Court said it was "not unmoved" by "the desire, the sincere desire of the Tribe and its Members to have the deeded land restored to it."

Tribes can also use zoning to handicap non-Indian businesses that compete on the reservation with Indian businesses.

The fact that non-Indians cannot participate in tribal government is not itself reason to deny tribes the right to regulate the activities of non-Indians on

land they own within reservation boundaries, see United States v. Mazurie, supra, 419 U.S., at 557-58; Williams v. Lee, 358 U.S. 217, 223 (1959); compare Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 172-73 (1982) (Stevens, J., dissenting), but it is reason to construe narrowly any exception to that general rule, a point neglected by the Court of Appeals.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

Thomas M. Christ*

Dennis D. Reynolds
Mitchell, Lang & Smith
200 One Main Place
101 S. W. Main
Portland, OR 97204
(503)221-1011
*Counsel of record